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No. 85-2039

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

FRIEDA JOYCE JOHNSON, INDIVIDUALLY AND AS ADMINISTRATRIX FOR THE ESTATE OF HORTON JOHNSON, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the doctrine of *Feres* v. *United States*, 340 U.S. 135 (1950), bars an action under the Federal Tort Claims Act brought on behalf of a serviceman killed incident to military service where the complaint alleges the negligence of civilian employees of the federal government.

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OPINIONS BELOW

The opinion of the court of appeals en banc (Pet. App. 1a-10a) is reported at 779 F.2d 1492. The panel opinion of the court of appeals (Pet. App. 11a-34a) is reported at 749 F.2d 1530. The district court's order (Pet. App. 35a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1986. On April 3, 1986, Justice Powell extended the time for filing a petition for a writ of certiorari to and including June 12, 1986. The petition for a writ of certiorari was filed on June 11, 1986, and was granted on October 6, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

28 U.S.C. 1346(b) provides in part:

> Subject to the provisions of [28 U.S.C. 2671 *et seq.*], the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

STATEMENT

1. Lieutenant Commander Horton Johnson was a helicopter pilot in the United States Coast Guard, "a branch of the armed forces of the United States" (14 U.S.C. 1; see also 10 U.S.C. 101(4)) responsible for operating "rescue facilities for the promotion of safety on, under, and over the high seas * * * of the United States" (14 U.S.C. 2). In the early morning hours of January 7, 1982, Lieutenant Commander Johnson's Coast Guard station in Hawaii received a distress call from a boat lost in a storm. Lieutenant Commander Johnson and several other members of the Coast Guard responded to the call for assistance; he piloted a helicopter to the area from which the distress call had been received. Visibility during the storm was quite poor, and while searching for the boat Lieutenant Commander Johnson requested radar assistance from Federal Aviation Administration (FAA) air traffic controllers. The FAA air traffic controllers pro-

vided air traffic control services to Lieutenant Commander Johnson's helicopter, but it crashed into a mountain and all on board died. Pet. App. 12a.

Respondent, Lieutenant Commander Johnson's widow and the administratrix of his estate, applied for and received the full range of veterans' benefits payable as a result of Lieutenant Commander Johnson's death.[1] In addition, respondent brought this action in the United States District Court for the Southern District of Florida under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, seeking damages from the United States. Respondent did not allege that Lieutenant Commander Johnson's fellow service members or superior officers acted negligently. Instead, respondent claimed that the air traffic controllers negligently guided Lieutenant Commander Johnson's helicopter. The district court dismissed the complaint because the injury to Lieutenant Commander Johnson arose out of activity incident to military service and therefore is barred by *Feres* v. *United States*, 340 U.S. 135 (1950) (Pet. App. 35a).

2. The court of appeals reversed. The court did not dispute that Lieutenant Commander Johnson's death occurred incident to service. And in cases involving the "typical *Feres* factual paradigm" the court concluded that "the issue is whether the injury arose out of or during the course of an activity incident to service" (Pet. App. 25a). But the court concluded that this was not a typical *Feres* case because "the alleged tortfeasor is not a member of the armed forces or a civilian employee engaged in activities usually associated with the armed forces" (*ibid.*).

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[1] The Coast Guard advises us that respondent has received $35,690.66 in life insurance, a $3,000 death gratuity, and presently receives approximately $868 per month in dependency and compensatory benefits.

Because the alleged tortfeasor was a civilian, the court concluded that an analysis of the facts of this case was warranted to determine whether allowing respondent's claim to go forward would undermine the purposes of the *Feres* doctrine (*ibid.*).

The court concluded, after review of this Court's *Feres* doctrine cases, that "[t]his much-maligned doctrine" (Pet. App. 27a) is based primarily upon "the reluctance to upset, via the civilian forum, the delicate relationships which must exist for the military system to properly function" (*id.* at 28a). The court concluded that "[t]here is absolutely no hint in the scant record before this court that the conduct of any alleged tortfeasor even remotely connected to the military will be scrutinized if this case proceeds to trial" (*ibid.*). Because, in the court's view, "the prosecution of plaintiff's claim cannot conceivably involve or compromise a military relationship or, for that matter, the military disciplinary structure" (*id.* at 29a), the court held that respondent's suit is not barred by the *Feres* doctrine.

3. The court of appeals granted the government's suggestion for rehearing en banc, but on rehearing reinstated the panel's opinion (Pet. App. 2a-5a). Like the panel, the en banc court reasoned that the "claims presented are based solely upon the conduct of civilian employees of the Federal Aviation Administration * * * who were not in any way involved in military activities" (*id.* at 5a) so that, in the court of appeals' view, a trial here would not require civilian courts to second-guess military decisions.

Judge Johnson, joined by Judges Tjoflat, Roney, and Hill, dissented. They would have affirmed the dismissal of the complaint on the basis that the injury to Lieutenant Commander Johnson arose out of activity incident to military service and therefore was barred by *Feres*. The majority's contrary result, Judge Johnson noted, directly conflicted with the decisions of numerous other courts of

appeals which have uniformly applied *Feres* to bar actions by service members based on the alleged negligence of civilian employees of the federal government (Pet. App. 7a-8a). Judge Johnson also relied directly on this Court's *Feres* doctrine cases, since the Court has never limited the application of *Feres* to military tortfeasors. Rather, Judge Johnson noted this Court's statement in *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 669 (1977), that *Feres* barred recovery by an on-duty serviceman injured due to the negligence of "Government officials" (Pet. App. 10a). Since the FTCA is only relevant to alleged torts by government employees, Judge Johnson reasoned that the only inquiry in this case is "whether or not [the] serviceman's injury was incident to service" (*ibid.*). He concluded that Lieutenant Commander Johnson's death necessarily was incident to service, since it occurred "in the course of duty on a regular Coast Guard mission" (*ibid.*).

SUMMARY OF ARGUMENT

Shortly after the Federal Tort Claims Act was enacted, this Court determined in *Feres* v. *United States,* 340 U.S. 135, 146 (1950), that the Act did not waive the sovereign immunity of the United States for "injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." In reaching that conclusion and in reiterating the holding of *Feres* in later cases, the Court has consistently stressed that service members injured incident to service cannot recover from the federal government on account of the negligence not only of other service members but of *federal employees* in general. The courts of appeals have consistently held, until this case, that the *Feres* doctrine bars recovery from the federal government on behalf of a service member injured inci-

dent to service, whether the service member was injured as a result of negiligence by another service member or by a civilian employee.

This Court has stated that the primary basis for the *Feres* doctrine is that it bars suits that "would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness" (*United States* v. *Shearer*, No. 84-194 (June 27, 1985), slip op. 7). As the courts of appeals other than the court below have recognized, the conduct of military affairs inevitably involves cooperation between civilian employees of the federal government and military personnel. Trials in cases involving allegations that negligence on the part of civilians working with the military led to injury or death of a service member incident to service will undermine important relationships necessary to the conduct of military operations.

This case demonstrates the deleterious effects on military discipline and effectiveness that would result from permitting tort suits alleging negligence by civilian employees of the federal government. Civilian air traffic controllers, like those charged with negligence here, frequently work closely with the military, and such allegations disrupt the important relationship between the military and the FAA. Further, a trial in this case would almost certainly require military personnel to account for their decision to order Lieutenant Commander Johnson aloft and to evaluate the performance of the military personnel involved in the rescue operation. Thus, the court of appeals erred in concluding, under its case-by-case inquiry to determine whether the primary purpose underlying the *Feres* doctrine would be undermined by a trial in this case, that a trial here would not disrupt military discipline and effectiveness.

Moreover, the court of appeals erred in concluding that a case-by-case inquiry was appropriate. The test established by this Court in *Feres* and reiterated since—that a tort suit on behalf of a service member is barred where the injury occurred incident to service—appropriately defines the class of cases where dismissal is necessary to avoid interference by civilian courts with military affairs. Cases where injury occurred incident to service are "the *type* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness" (*Shearer,* slip op. 6-7 (emphasis in original)).

Furthermore, the other factors underlying the *Feres* doctrine indicate that suit should be barred whenever an injury occurs incident to service, whether allegedly caused by the negligence of a service member or a civilian employee. The Veterans' Benefits Act compensates service members injured incident to service and "provides an upper limit of liability for the Government as to service-connected injuries" (*Stencel Aero Engineering Corp.* v. *United States,* 431 U.S. 666, 673 (1977)). The court of appeals' decision has the incongruous result of allowing compensation under both the Veterans Benefits Act and the FTCA if, but only if, the governmental negligence is committed by a civilian employee. Also, it is highly unlikely, given the distinctively federal relationship between the government and service members, that Congress intended for state law to govern claims by service members against the government whenever the injury was caused by civilian employees of the United States.

ARGUMENT

THE *FERES* DOCTRINE BARS FTCA ACTIONS BROUGHT ON BEHALF OF SERVICE MEMBERS INJURED INCIDENT TO MILITARY SERVICE WHERE THE COMPLAINT ALLEGES THE NEGLIGENCE OF CIVILIAN EMPLOYEES OF THE UNITED STATES

The Federal Tort Claims Act (FTCA) "waived sovereign immunity from suit for certain specified torts of federal

employees" (*Dalehite* v. *United States,* 346 U.S. 15, 17 (1953)). However, the Court has recognized repeatedly that "[t]he Act did not waive the sovereign immunity of the United States in all respects" (*United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense* (*Varig Airlines*), 467 U.S. 797, 808 (1984)). See *Kosak* v. *United States,* 465 U.S. 848 (1984); *Dalehite,* 346 U.S. at 17. Shortly after the enactment of the FTCA, this Court held that "the government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to [military] service" (*Feres* v. *United States,* 340 U.S. 135, 146 (1950)). In construing the FTCA to bar claims for injuries "incident to service," the Court noted that "if we misinterpret the Act, at least Congress possesses a ready remedy" (*Feres,* 340 U.S. at 138). On numerous occasions since *Feres* was decided, Congress has declined to amend the FTCA to allow service members to sue for injuries incident to service.[2] And only two terms ago this Court reaffirmed the holding in *Feres* that "a soldier may not recover under the Federal Tort Claims Act for injuries which 'arise out of or are in the course of activity incident to service' " (*United States* v. *Shearer,* No. 84-194 (June 27, 1985), slip op. 4-5, quoting *Feres,* 340 U.S. at 146).

There is no doubt that the death of Lieutenant Commander Johnson occurred incident to military service—specifically in the course of a rescue mission. If respondent's complaint had alleged negligence by fellow service members or superior officers, all agree that it would be barred by the *Feres* doctrine. This Court's cases, and the policies underlying *Feres*, compel the conclusion

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[2] For example, each of the two prior Congresses has considered but failed to enact legislation that would allow service members to bring medical malpractice suits. See H.R. 1161, 99th Cong., 1st Sess. (1985); H.R. 1942, 98th Cong., 1st Sess. (1983).

that the doctrine is not rendered inapplicable simply because negligence is alleged on the part of civilian rather than military employees of the United States.

A. Prior To This Case, The Courts Had Consistently Applied The *Feres* Doctrine To Bar Claims By Service Members Injured Incident To Service, Whether By Acts Of Civilian Or Military Employees Of The Federal Government

Although the plaintiffs in *Feres* were injured by other service members (see 340 U.S. at 138), the Court's opinion contained "no reference, except as a mere statement of fact, to the military status of the primary tort feasors, and certainly no reliance on that fact" (*Sheppard* v. *United States,* 294 F. Supp. 7, 8 (E.D. Pa. 1969)). Indeed, rather than limiting its ruling to the tortious acts of fellow service members, the Court in *Feres* ruled broadly that "[w]e know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers *or the Government he is serving*" (*Feres,* 340 U.S. at 141 (footnote omitted; emphasis added)).

Since *Feres,* the Court has "adhere[d] * * * to the line drawn in the *Feres* case between injuries that did and injuries that did not arise out of or in the course of military duty" (*United States* v. *Brown,* 348 U.S. 110, 113 (1954)). In *Stencel Aero Engineering Corp.* v. *United States,* 431 U.S. 666 (1977), the Court, in holding that a private contractor who paid damages to a serviceman may not sue the United States for indemnity, reaffirmed that "[i]n *Feres* v. *United States, supra,* the Court held that an on-duty serviceman who is injured *due to the negligence of Government officials* may not recover against the United States under the Federal Tort Claims Act" (431 U.S. at 669 (emphasis added)); see also *id.* at 673 (emphasis added) ("at issue would be the degree of fault, if any, on the part of the *Government's agents* and the effect upon the serviceman's safety"); *Dalehite* v. *United States,* 346 U.S. 15, 31 n.25 (1953) (emphasis added) (characterizing the three

cases decided *sub nom. Feres* v. *United States, supra,* as involving "injuries * * * allegedly caused by negligence of *employees of the United States*"). Thus, the crucial inquiry under this Court's cases has been whether the injury to the service member was "incident to service." See *United States* v. *Shearer,* No. 84-194 (June 27, 1985), slip op. 4-5, quoting *Feres,* 340 U.S. at 146; *Brown,* 348 U.S. at 113; *Feres,* 340 U.S. at 138; *Brooks* v. *United States,* 337 U.S. 49, 50, 53 (1949).

The Court's decision in *Brooks,* decided just a year before *Feres,* buttresses the conclusion that the applicability of *Feres* does not turn on whether the alleged negligence was committed by civilian or military employees of the federal government. In *Brooks* a serviceman was killed when his car was struck by a truck driven by a civilian employee of the United States (see 337 U.S. at 50). In holding that the serviceman could bring an FTCA action, the Court did not rely upon the civilian status of the tortfeasor employee. Instead, the Court focused on the fact that the injury occurred off-base, while the serviceman was on leave, and had no connection to the military—*i.e.*, that the injury was not "incident to * * * Brooks' service" (*id.* at 52). In subsequent decisions the Court has reaffirmed that the result in *Brooks* hinged not on the fact that the tortfeasor was a civilian employee of the government, but rather on the fact that the injury there was not incident to military service. See *Shearer,* slip op. 6; *Brown,* 348 U.S. at 111-113.[3]

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[3] See also *Hass ex rel. United States* v. *United States,* 518 F.2d 1138, 1141-1142 n.4 (4th Cir. 1975) (holding that the *Feres* doctrine applies where the tortfeasor is a civilian employee of the United States, and relying on the fact that "[i]n *Brooks* the Army truck that hit claimants' car was driven by a civilian, but the Supreme Court simply mentioned that fact in passing and placed no emphasis upon it in reaching a decision").

Except for the decision below, every court to address the question—including six other circuits—has held that the *Feres* doctrine bars FTCA actions by service members injured incident to service by the alleged negligence of civilian employees of the federal government. *Newell* v. *United States,* No. 86-1114 (3d Cir. Sept. 15, 1986) (opinion not for publication)[4]; *Warner* v. *United States*, 720 F.2d 837 (5th Cir. 1983); *Carter* v. *City of Cheyenne*, 649 F.2d 827 (10th Cir. 1981); *Uptegrove* v. *United States*, 600 F.2d 1248 (9th Cir. 1979), cert. denied, 444 U.S. 1044 (1980); *Woodside* v. *United States*, 606 F.2d 134 (6th Cir. 1979), cert. denied, 445 U.S. 904 (1980); *Certain Underwriters at Lloyd's* v. *United States*, 511 F.2d 159 (5th Cir. 1975); *United States* v. *Lee*, 400 F.2d 558 (9th Cir. 1968), cert. denied, 393 U.S. 1053 (1969); *United Air Lines* v. *Wiener*, 335 F.2d 379 (9th Cir.), cert. dismissed, 379 U.S. 951 (1964); *Layne* v. *United States*, 295 F.2d 433 (7th Cir. 1961), cert. denied, 368 U.S. 990 (1962); *Watkins* v. *United States*, 462 F. Supp. 980 (S.D. Ga. 1977), aff'd, 587 F.2d 279 (5th Cir. 1979); *Gilardy* v. *United States*, No. 83-1277 (D. Hawaii June 13, 1984), appeal pending, No. 84-2269 (9th Cir.); *Sigler* v. *LeVan*, 485 F. Supp. 185 (D. Md. 1980); *Frazier* v. *United States*, 372 F. Supp. 208 (M.D. Fla. 1973); *Sheppard* v. *United States*, 294 F. Supp. 7 (E.D. Pa. 1969). In each of these cases the service member was injured in the course of activity incident to service by the alleged negligence of civilian employees of the federal government who did not work for the Department of Defense. In each case the court held that where the injury to the service member arises out of "activity incident to service" (*Feres*, 340 U.S. at 146), and is caused by the "negligence of Government officials" (*Stencel*, 431

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[4] Copies of this opinion have been lodged with the Clerk of the Court and sent to counsel for respondent.

U.S. at 669), the service member cannot recover "against * * * the Government he is serving" (*Feres*, 340 U.S. at 141).[5]

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[5] A number of other courts have applied the *Feres* doctrine where a service member bases a claim on the actions of civilian employees of the United States who, unlike FAA personnel, are employed by the Department of Defense or are in the military chain of command. See, *e.g.*, *Jaffee* v. *United States*, 663 F. 2d 1226, 1238 (3d Cir. 1981), cert. denied, 456 U.S. 972 (1982); *Hass ex rel. United States* v. *United States*, 518 F.2d 1138, 1141 (4th Cir. 1975). We do not understand the court of appeals to have disagreed with such decisions. According to the court, cases alleging negligence on the part of civilians employed by the Department of Defense or in the military chain of command would fall into what the court described as the "typical *Feres* factual paradigm," since that paradigm includes cases where the alleged tortfeasor is "a civilian employee engaged in activities usually associated with the armed forces" (Pet. App. 25a). In such cases, the court here stated, tort claims against the United States are barred as long as the injury was incurred incident to service, and no inquiry into whether the purposes underlying the *Feres* doctrine would be compromised by permitting the suit to go forward is warranted (*ibid.*).

However, the Eleventh Circuit recently held that an FTCA claim based on negligence on the part of both military personnel and civilians working with them was not barred. *Stanley* v. *United States*, 786 F.2d 1490 (1986), petition for cert. pending, No. 86-393 (we have sent a copy of our petition in *Stanley* to counsel for respondent). In *Stanley* the court concluded that the plaintiff could go forward with an FTCA claim alleging injury based on the negligence of his superior officers and civilians who participated in a chemical testing program conducted by the Army. The court in *Stanley* relied on the decision of the court in this case in concluding, contrary to the court's plain statement here (Pet. App. 25a), that an inquiry was warranted to determine whether the purposes underlying the *Feres* doctrine would be advanced by barring the particular suit (786 F. 2d at 1499). Therefore, it may be that case-by-case inquiries will now be conducted in all cases in the Eleventh Circuit involving the *Feres* doctrine unless the decision below is reversed.

B. Failure To Apply The *Feres* Doctrine Where Actions Of Civilian Employees Are At Issue Will Interfere With Military Discipline And Effectiveness

It is because of the varied and wide-ranging nature of military activity that the Court in *Feres* and *Stencel* spoke in terms of injuries incurred incident to military service rather than in terms of injuries caused by other service members, and that every court other than the court below has applied *Feres* to bar claims of civilian negligence. Courts have correctly recognized that "when military actions are taken or military operations carried out, the United States government acts as an entity, often relying upon and drawing from its civilian agencies for personnel, equipment, technological assistance, or intelligence reports" (*Newell*, slip op. 5). This Court has stated that the *Feres* doctrine is " 'best explained by the peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty' " (*Shearer*, slip op. 5, quoting *United States* v. *Muniz*, 374 U.S. 150, 162 (1963)). The court of appeals' conclusion that a trial here would not interfere with military effectiveness or call for scrutiny of military decisions is wholly unrealistic. Cases involving allegations that negligence on the part of civilians working with the military led to injuries incurred incident to service are "the *type* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness" (*Shearer,* slip op. 6-7 (emphasis in original)), as the facts of this case illustrate.

1. Military activities are not simply the actions of the armed forces. Rather, in all respects they represent actions taken by and on behalf of the United States of America

through all of its agents, and civilians frequently play a critical role in numerous military activities and operations. Civilians may, for example, prepare and maintain military equipment (see *Newell*, slip op. 5 (Maritime Administration maintained ship for use by the Navy)), assist in the design and production of weapons systems (see 42 U.S.C. 2034-2035 (Department of Energy cooperates with the armed forces in developing, manufacturing, and storing nuclear weapons)), provide necessary medical care (see *Certain Underwriters at Lloyd's*, 511 F.2d at 160 (Public Health Service employees worked with military physicians)), participate in intelligence activities with the military (see *Sigler*, 485 F. Supp. at 1919; Exec. Order 12333, §§ 1.11(d), 1.12, 3 C.F.R. 207-209 (1982) (CIA and FBI cooperate with armed services intelligence agencies)), or control military air traffic (see *Uptegrove* v. *United States, supra*). In these situations, "a civilian is analogous to a serviceman when he is performing functions for the benefit of the military" (*Hass ex rel. United States* v. *United States*, 518 F.2d 1138, 1142 n.4 (4th Cir. 1975)).

Given the extensive civilian involvement in activities incident to military service, the courts other than the court below have uniformly applied the *Feres* doctrine to claims alleging civilian negligence. Here, too, it is illogical to suggest that military effectiveness requires barring an action challenging the decisions of Lieutenant Commander Johnson's fellow service members who participated in this rescue mission, but permits an action against FAA personnel who were necessarily involved in military activities and worked with those military personnel.

2. The court of appeals' conclusion that this case will not interfere with military discipline and effectiveness (see Pet. App. 4a-5a, 28a-29a) is wrong.

a. FAA air traffic controllers frequently work closely with the armed services, as this case illustrates. In guiding Lieutenant Commander Johnson's helicopter, the air

traffic controllers were called upon to assist in a dangerous military operation. Indeed, civilian employees of the FAA frequently are called upon to participate in a wide range of important military operations. FAA air traffic controllers participate in war games and exercises and help to assure the defense of the nation by assisting the armed forces in the interception of unknown aircraft entering United States airspace. See FAA, U.S. Dep't of Transp., *Order 7610.4F: Special Military Operations* 36, 106, 123-124, 134 (Jan. 21, 1981) (*FAA Order 7610.4F*).[6] FAA air traffic controllers also work closely with the Strategic Air Command; they assist in the guidance of the United States aircraft equipped to fire nuclear weapons and the guidance of those aircraft which direct the firing of our land-based nuclear missiles (*id.* at 32). Air traffic at many military bases is directed by FAA controllers (*id.* at 29, 30), and even where military controllers are utilized civilian controllers are responsible for evaluation and review of military control facilities (*id.* at 19, 28).

Additionally, as liaison officers, FAA employees assist and advise various components of the military in the performance of their defense functions. FAA employees serve as advisers to the North American Aerospace Defense Command (NORAD) in "defending the North American continent against air attack" (*FAA Order 7610.4F* at 36). In this capacity FAA employees help NORAD develop plans for the security control of United States airspace, designate zones essential to the NORAD mission and regulate airspace in these zones, and provide air traffic controller surveillance and information (*id.* at 36-37). FAA employees assist the Air Force's Military Airlift Command in "conducting military airlift operations whenever * * * required in times of peace or war" (*id.* at 40). The FAA

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[6] A copy of this order has been lodged with the Clerk of the Court.

shares information and data with and advises the Navy on air traffic control as part of the Navy's efforts to ensure aviation safety (*id.* at 34). Thus, the FAA is involved in many of our nation's most important and sensitive military activities. As both the FAA and the armed services have concluded, "[t]he cooperation and active participation of the FAA is essential to the effective accomplishment of [these military] mission[s]" (*id.* at 40; see also *id.* at 1, 17, 34, 36).[7]

It follows that allowing suits by service members against FAA air traffic controllers would disrupt a working relationship which is crucial to the general defense and national security and "would be just as disruptive of harmonious relations as would a suit against a fellow serviceman" (*Hass*, 518 F.2d at 1143). Under the court of appeals' approach, FAA air traffic controllers assisting the military must now fear being haled into court to have their decisions called into question. Moreover, it appears that under the court of appeals' approach civilian employees

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[7] To these ends, the FAA is staffed with military liaison officers for the armed services and for numerous special military operations, including liaison officers for the Strategic Air Command and the Tactical Air Command. See *FAA Directory* 8-9 (1985). Military representatives also are stationed in FAA regional headquarters. See *id.* at 19, 25, 35, 67, 75, 107, 125. Similarly, FAA employees serve as liaison officers to the armed forces and many special military missions. See *FAA Order 7610.4F* at 21, 28, 32, 34, 40. In many cases the FAA and the armed services have entered into memoranda of understanding specifically detailing the duties of FAA employees in military operations. See, *e.g.*, Memorandum of Agreement Between FAA and the Army, Navy, and Air Force; Memorandum of Understanding Between Strategic Air Command and FAA Concerning Interagency Liaison; Memorandum of Understanding Between NORAD and FAA; Memorandum of Understanding Between Department of Defense and FAA; Memorandum of Understanding Between United States Naval Atlantic Fleet and FAA Concerning Interagency Liaison (all reprinted in *FAA Order 7610.4F* at 28-46).

assisting the military must act with the knowledge that their military judgments may be the basis for individual liability, although in our view state law tort claims alleging individual liability should be barred where the *Feres* doctrine precludes liability under the FTCA.[8] But to ensure the success of military activities, it is important that civilians participating in military activities "be ready to provide an effective defense on a moment's notice" (*Goldman* v. *Weinberger*, No. 84-1097 (Mar. 25, 1986), slip op. 5) and act without hesitation or debate. Permitting service members to challenge the decisions of civilians working with the armed services, and "expos[ing] [civilians] to the chances of ruinous litigation" (*Martin* v. *Mott*, 25 U.S. (12 Wheat.) 19, 37 (1827)), would inevitably cause some civilians to hesitate before acting. Because FAA air traffic controllers often work closely with the military, permitting service members injured incident to service to bring tort claims alleging negligence by an air traffic controller would undermine military effectiveness.

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[8] It is our view that federal employees are immune from common law tort actions arising in the course of their duties (see *Westfall* v. *Erwin*, petition for cert. filed, No. 86-714). Even if that view is rejected, where the government is immune under *Feres*, civilian personnel working with the military nevertheless should be immune from damage suits on behalf of service members injured incident to military service for the same reasons that the government is immune. As the court of appeals stated in *Jaffee*, in holding that state law claims against military and civilian personnel based on injuries incurred incident to service were barred: "Suits founded on state law have the same potential for undermining military discipline as federal tort claims. In addition, Veterans' Benefits are available for those bringing suits founded on state law, just as they are for those bringing federal tort claims suits." 663 F.2d at 1238-1239. However, if the *Feres* doctrine does not bar service members from bringing FTCA claims based on the negligence of civilian personnel, it would not bar state law tort claims against civilians assisting in military operations either.

b. Apart from the ways in which any litigation on behalf of an injured service member alleging negligence by an air traffic controller would interfere with military effectiveness, the court of appeals erred in its suggestion (Pet. App. 28a-29a) that since only the negligence of civilian employees was alleged, there will be no need for military officials to testify or for a court to scrutinize decisions made by military personnel in this case. In many instances, a trier of fact could not possibly evaluate the conduct of the FAA air traffic controllers without considering the military nature of the mission involved. At trial, the United States would be required to show that the air traffic controllers acted reasonably, which might require testimony describing the hazardous nature of the conditions, the danger involved in the particular rescue mission, and the pressing need to fly in weather not suited for civilian aircraft. These are matters "far removed from those * * * encounter[ed] in the ordinary run of civilian litigation" (*Noyd* v. *Bond*, 395 U.S. 683, 694 (1969)). Rather, they involve the peculiar demands of the military " 'without counterpart in civilian life' " (*Chappell* v. *Wallace*, 462 U.S. 296, 300 (1983), quoting *Schlesinger* v. *Councilman*, 420 U.S. 738, 757 (1975)). Such testimony would, in many instances, be available only from military personnel.

Since the district court properly dismissed the case after concluding that the injury was incurred incident to service, it is not possible to describe precisely what harms to military discipline and effectiveness would result from trial here. It is clear, however, that to defend cases such as this the United States would sometimes be forced to place on trial military decisions—*i.e.*, to prove that it was military officials, whose actions could not be a basis for liability, rather than the civilian defendants who were negligent. Here, for example, to defend itself the United States may be required to prove that Lieutenant Com-

mander Johnson's death was the result of the negligence of his co-pilot or attributable to his superior officer's decision to send a helicopter aloft in poor weather conditions. That would require superior officers and military personnel to testify regarding their own military decisions and the decisions of others, and likewise demand that civilian courts evaluate the judgments of military personnel. This intrusive inquiry obviously would be destructive of military morale and would strike at the heart of the " 'peculiar and special relationship of the soldier to his superiors' " (*Shearer*, slip op. 5 (quoting *United States* v. *Muniz*, 374 U.S. at 162)).

Moreover, it is inevitable that cases involving dangerous military operations will raise questions of contributory negligence, again requiring service members to testify against each other and courts to judge the conduct of the injured party and others involved. In an air accident where the pilot was injured, for example, the United States might be required to argue that the pilot acted negligently, which might require the pilot's fellow service members and superior officers to second-guess the pilot's actions. And to rebut any adverse testimony from his superior officers and fellow soldiers, the service member might have to bring into court other superior officers or fellow service members to show that he acted properly, or that the other superior officers or fellow service members who testified were biased. It is difficult to conceive of a trial that would be more disruptive of the "established relationship between enlisted military personnel and their superior officers" (*Chappell*, 462 U.S. at 300).

c. Thus, contrary to the court of appeals' assertion, military discipline and effectiveness would most likely be hindered by a trial in any case where a service member injured incident to service alleges negligence on the part of an air traffic controller, and service members would almost certainly be brought into court and called upon to

account for their military decisions in this case. We submit more broadly, however, that courts should not inquire in each case as to whether a trial will involve sensitive military affairs or require members of the armed forces to testify against each other. Rather, as the Court held in *Feres*, claims should be barred wherever an injury occurs incident to military service.

The rule enunciated in *Feres* allows suit in most cases having no likely effect on military discipline and effectiveness. Once it is determined that an injury occurred incident to service, however, it is probable that ongoing relationships will be disrupted and military decisions called into question. It is also impossible to predict with certainty precisely what the consequences of proceeding to trial will be. Moreover, the process of inquiring into the facts surrounding an injury that occurred incident to service may be disruptive, so case-by-case inquiries to determine the effect of permitting cases to go forward can create the harm the *Feres* doctrine aims to prevent. Thus, the Court's holding in *Feres* was not based on any finding that in the particular cases (two of which were medical malpractice cases (see 340 U.S. at 137-138)) military discipline would in fact be disrupted. Instead, the Court held them barred because "they were the *type* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness" (*Shearer*, slip op. 6-7 (emphasis in original)).[9] Accordingly, if a service member is injured

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[9] Despite the Court's holding in *Feres*, the Ninth Circuit recently held that a servicewoman was not barred from bringing a malpractice claim under the FTCA alleging that she received negligent pregnancy care at an Army medical center. *Atkinson* v. *United States*, No. 85-2200 (Nov. 14, 1986). The court distinguished *Feres* by stating: "[P]regnant servicewomen did not serve on active duty in 1950 when *Feres* was decided. Thus, the Supreme Court, in barring the two malpractice claims in *Feres*, could not have had in mind the unique

incident to military service, a claim on his behalf is properly barred by the *Feres* doctrine whether the service member was injured as the result of negligence on the part of another service member or a civilian employee of the federal government.[10]

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facts involved in Atkinson's claim." Slip op. 8. The court then concluded that "[t]here is simply no connection between Atkinson's medical treatment and the decisional or disciplinary interest protected by the *Feres* doctrine" (*id.* at 9-10). The court failed to recognize that medical malpractice cases brought by service members are the type of claims that would undermine military discipline and effectiveness, as this Court noted in *Shearer*.

[10] In concluding that case-by-case inquiries are appropriate, the court of appeals relied (Pet. App. 4a) on the Court's statement in *Shearer* that "[t]he *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases" (slip op. 5). The court of appeals misread that comment, which was made in the context of rejecting the argument that *Feres* was inapplicable because the serviceman was off-duty and not on a military base at the time he was killed. The Court's comment and conclusion in *Shearer* that military discipline and effectiveness can be undermined in cases where an injury occurred while a service member was off-duty and off-base, based on the particular facts of the case, does not suggest that every case must be examined to see if permitting a trial to go forward would interfere with military effectiveness or call for judicial second-guessing of military decisions. Rather, as the Court made clear in its opinion in *Shearer*, immediately after the statement quoted above, the proper analysis is whether the plaintiff's claim is "the *type* of claim[]" that would generally involve the judiciary "in sensitive military affairs at the expense of military discipline and effectiveness" (slip op. 6-7). In *Shearer* the Court held that a claim that military personnel negligently supervised a serviceman, leading to the death of another serviceman, was the type of claim that would generally undermine military discipline and effectiveness, even though the injury in question occurred while the serviceman was off-duty and not on a military base. Similarly, claims for injuries incurred incident to military service on account of the negligence of civilian employees of the federal government are the type of claims that would undermine military discipline and effectiveness.

C. The Other Policies Underlying The *Feres* Doctrine—The Presence Of An Alternative Veterans' Benefits Compensation Scheme And The Distinctively Federal Relationship Between A Service Member And The Government—Are Applicable To Cases Involving Civilian Negligence

Apart from concerns about adverse effects on military discipline and effectiveness, the Court in *Feres* based its holding on two other factors. First, the Court relied on the fact that service members injured incident to service receive compensation under the Veterans' Benefit Act, "which provide[s] systems of simple, certain, and uniform compensation" (*Feres,* 340 U.S. at 144) and "provides an upper limit of liability for the Government on service-connected injuries" (*Stencel Aero Engineering Corp.*, 431 U.S. at 673). Second, the Court in *Feres* relied upon the irrationality of applying state tort law to govern the "distinctively federal" relationship between "the Government and members of its armed forces" (*Feres,* 340 U.S. at 145). These other factors are fully applicable to claims by service members alleging the negligence of civilian employees of the federal government.

1. After Lieutenant Commander Johnson's accident, respondent applied for and received the full range of veterans' benefits. See 38 U.S.C. 401-423, 701-788; note 1, *supra.* The Court in *Feres* held that where a service member is injured "incident to service" (*Feres,* 340 U.S. at 144-146), veterans' benefits are the "exclusive" and "sole remedy" (*Hatzlachh Supply Co.* v. *United States,* 444 U.S. 460, 464 (1980)). The Court in *Feres* began its construction of the FTCA by noting that the veterans' benefits enactments predated the FTCA, and provided "a comprehensive system of relief * * * for [military personnel] and their dependents" (340 U.S. at 140) for injuries incident to service. The Court noted that "in deciding claims for wrongs incident to service under the Tort Claims Act, [it could not] escape attributing some bearing upon it to enactments

by Congress which provide systems of simple, certain, and uniform compensation for injuries or death to those in the armed services" (*id.* at 144).

Accordingly, the Court stressed that the FTCA "should be construed to fit into the entire statutory system of remedies against the Government" (340 U.S. at 139). The Court saw no basis in either the language of the FTCA or its legislative history to suggest that the "comprehensive" (*id.* at 140) and "uniform" (*id.* at 144) scheme of the Veterans' Benefits Act was to be supplanted by the more general FTCA in cases involving claims for injuries incident to service. Indeed, the Court found that the only relevant evidence strongly suggested that the FTCA remedy was to be unavailable in such cases. The Court stated that "[i]f Congress had contemplated that this Tort Act would be held to apply in cases of this kind, it is difficult to see why it should have omitted any provision to adjust these two types of remedy to each other. The absence of any such adjustment is persuasive that there was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service" (*ibid.*).[11]

Since *Feres* the Court has held repeatedly that in cases involving injuries incident to service a service member's exclusive remedy is that available under the Veterans' Benefits Act. In *Stencel,* the Court stressed that "the Veterans' Benefits Act establishes, as a *substitute for tort liability,* a statutory 'no fault' compensation scheme * * * [that] provides an upper limit of liability for the Government as to service-connected injuries" (431 U.S. at 671,

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[11] In holding that veterans' benefits were the exclusive remedy for injuries incident to service, the Court in *Feres* distinguished its prior decision in *Brooks,* where a serviceman had been paid veterans' benefits for an injury but nonetheless was allowed to maintain an FTCA action. The Court in *Feres* saw as a "vital distinction" (*Feres,* 340 U.S. at 146) the fact that "[t]he injury to Brooks did not arise out of or in the course of military duty" (*ibid.*).

673 (emphasis added)). And in *Hatzlachh* the Court reaffirmed what had been made plain in *Feres* and *Stencel*: "[T]he Veterans' Benefits Act provided compensation to injured servicemen, which we [in *Stencel*] understood Congress intended to be the *sole remedy for service-connected injuries*" (444 U.S. at 464 (emphasis added)).

The reasoning in *Feres* has been applied by the Court in other cases to hold that a specific compensation scheme preempts an FTCA action. In *United States* v. *Demko*, 385 U.S. 149 (1966), the Court held that a federal prisoner who received compensation under 18 U.S.C. 4126 could not also bring an FTCA action. While there was no statutory provision deeming the Section 4126 remedy exclusive, the Court noted that "compensation laws are practically always thought of as substitutes for, not supplements to, common-law tort actions" (385 U.S. at 151). Compare *Feres*, 340 U.S. at 143 (analogizing veterans' benefits to "workmens' compensation statutes which provide * * * the sole basis of liability"). And based on "rulings of this Court [that] have established as a general rule the exclusivity of a remedy under such compensation laws," the Court concluded that "where there is a compensation statute that reasonably and fairly covers a particular group * * *, it presumably is the exclusive remedy to protect that group" (*Demko*, 385 U.S. at 151, 152).[12]

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[12] Similarly, in *Brown* v. *GSA*, 425 U.S. 820, 825 (1976), the Court held that notwithstanding the absence of a specific exclusivity provision, Title VII is the exclusive remedy for claims of discrimination by federal employees. And recently the Court held that the Education Aid to Handicapped Children Act preempts more general constitutional claims alleging discrimination in the provision of education to handicapped children. See *Smith* v. *Robinson*, 468 U.S. 992, 1009-1013 (1984).

In disregarding respondent's receipt of veterans' benefits,[13] the court of appeals' decision contravenes the important policies which underlie the comprehensive statutory compensation scheme. In *Stencel,* the Court emphasized that this compensation scheme is significant "not only [because it] provides a swift, efficient remedy for the injured serviceman" (431 U.S. at 673), but also because it "provides an upper limit of liability for the Government as to service-connected injuries" (*ibid.*). As the Court has noted, activities that are incident to service involve "[s]ignificant risk of accidents and injuries" (*Stencel,* 431 U.S. at 672). This case dramatically demonstrates the point. Lieutenant Commander Johnson was called upon to participate in a dangerous military rescue operation. Indeed, as a "military service" (14 U.S.C. 1; see also 10 U.S.C. 101(4)) responsible for operating "rescue facilities * * * on, under, and over the high seas" (14 U.S.C. 2), the Coast Guard must necessarily undertake hazardous activities "without counterpart in civilian life" (*Councilman,* 420 U.S. at 757). Unfortunately, injuries inevitably arise out of such operations. The court of appeals' opinion, which exposes the United States to damages for injuries incident to such hazardous military missions, removes the " 'protective mantle of the Act's limitation-of-liability provisions' " (*Stencel,* 431 U.S. at 673, quoting *Cooper*

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[13] The court of appeals rejected respondent's claim that the receipt of veterans' benefits is irrelevant in applying *Feres* (Pet. App. 20a-21a & n.4), but the court nonetheless disregarded the fact that respondent is receiving veterans' benefits in reaching its decision. This Court has cautioned that factors other than the concern with military discipline and effectiveness are "no longer controlling" in *Feres* doctrine cases (*Shearer,* slip op. 6 n.4). Nonetheless, this Court and the courts of appeals have repeatedly relied on the fact that a plaintiff is receiving veterans' benefits in applying *Feres.* See *Shearer,* slip op. 6 n.4; *Stencel,* 431 U.S. at 672-673; *Carter,* 649 F.2d at 830; *Jaffee,* 663 F.2d at 1228; *Uptegrove,* 600 F.2d at 1250.

Stevedoring Co. v. *Fritz Kopke, Inc.*, 417 U.S. 106, 115 (1974)), and thereby "frustrat[es] one of the essential features of [that scheme]" (*ibid.*) in cases involving the negligence of a civilian employee of the federal government.[14]

It is clear that the rule adopted by the court of appeals would allow for evasion of the *Feres* doctrine in a large number of cases. With the extensive civilian involvement in all activities incident to service, it would not be difficult for an injured service member to allege that his injury was the result of civilian negligence. Thus, if the court of appeals' decision were upheld, plaintiffs in many cases could avoid dismissal of their actions by focusing on actions taken by civilians. For example, *Feres* involved a claim of negligence on behalf of a service member who died in a fire in his barracks (see 340 U.S. at 137), and the Court held that an FTCA claim alleging negligence in the maintenance of the barracks was barred. But if the plaintiff had alleged negligence on the part of a civilian agency (such as the General Services Administration) that played some role in the provision of housing or office space to military personnel, that claim could be raised under the court of appeals' test.

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[14] Respondent's claim that this case is "no different * * * than it would have been if [Lieutenant Commander Johnson] had been employed by United Airlines" (Br. in Opp. 9) is particularly telling in this context. If Lieutenant Commander Johnson had been a pilot for United Air Lines, his sole remedy against his employer would have been workmen's compensation, the analogue to veterans' benefits. See *Feres*, 340 U.S. at 145. Moreover, if the FAA air traffic controllers had been injured during the course of the rescue operation, their sole remedy would have been provided by the Federal Employees Compensation Act. See 5 U.S.C. 8116(c). Thus, in holding that veterans' benefits are the exclusive remedy for injuries incident to service, the Court in *Feres* was treating service members the same as other federal employees and most private employees.

Similarly, the two companion cases decided with *Feres*, *Jefferson* v. *United States* and *United States* v. *Griggs*, involved claims of negligent medical care. See 340 U.S. at 137-138. It is not unusual for military personnel to receive medical treatment from civilian employees of the federal government. See *Certain Underwriters at Lloyd's*, 511 F.2d at 160. Here again, under the court of appeals' approach, the claims held barred in *Feres* could be raised simply by alleging only civilian negligence.[15] Plainly, to allow respondent's action and similar actions to be brought would be "to * * * admit at the back door that which has been * * * turned away at the front door" (*Laird* v. *Nelms*, 406 U.S. 797, 802 (1972)). There is no basis for concluding that this Court in *Feres* sought to permit evasion of its holding by artful pleading.[16]

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[15] Of course, the claims would be dismissed under the court of appeals' test if the court decided that military discipline and effectiveness would be disrupted by a trial in the particular case. However, given the court's inability to discern any possibility of disruption here, it seems that under the Eleventh Circuit's approach cases will be dismissed pursuant to the *Feres* doctrine only when it is clear and indisputable that a trial in a particular case will disrupt military discipline and effectiveness. That conclusion is made all the more clear by the court's recent decision in *Stanley*. In that case the court held that a trial of FTCA claims against the government and *Bivens* claims against a serviceman's superior officers and civilians working with them on chemical warfare tests would not disrupt military discipline and effectiveness because the service member injured in that case was not injured as the result of following a particular order (786 F.2d at 1496), even though it was absolutely clear that a trial in that case would require service members to testify concerning their military decisions. It thus appears that the Eleventh Circuit would find military discipline and effectiveness undermined sufficiently to bar a tort suit in the most extreme cases only.

[16] In addition, adopting the court of appeals' approach would lead to anomalous results that could not have been intended by Congress. In cases where there is no civilian whose negligence can be alleged—for example, where a service member receives medical care

2. The Court in *Feres* admonished that the "relationship between the Government and members of its armed forces is 'distinctively federal in character.' " *Feres,* 340 U.S. at 143, quoting *United States* v *Standard Oil Co.,* 332 U.S. 301, 305 (1947). Significantly, when expressing this concern the Court in *Feres* repeatedly described the crucial relationship that must be governed by federal law as the relationship "between the *Government* and members of its armed forces" (340 U.S. at 143 (emphasis added))—not simply the relationship between the various members of its armed forces. The armed services, as part of their "nationwide function in protecting the security of the United States, [must] frequently move large numbers of men * * * from one end of the continent to the other, and beyond" (*Stencel Aero Engineering Corp.,* 431 U.S. at 672). Given "the need for uniform legal standards for military personnel, who must frequently travel between the various states" (*Jaffee,* 663 F.2d at 1239), the Court in *Feres* found that Congress did not intend for state law, which governs in FTCA actions (28 U.S.C. 1346(b)), to apply to this distinctively federal relationship. See *Feres,* 340 U.S. at 143-144. Just as it "would hardly be a rational plan" (*Feres,* 340 U.S. at 143) to have state law govern what Lieutenant Johnson's superior officers or fellow service members did in this military operation, it would "make[] no sense" (*ibid.*) to have the varying laws of the fifty

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from military personnel only—an FTCA claim would be barred by *Feres* and veterans' benefits would be the exclusive remedy. But in a case where medical care is received from both military and civilian personnel, the claim would not be barred under the court of appeals' approach, and the service member could receive both veterans' benefits and damages under the FTCA. It is quite unlikely that Congress intended service members identically situated to have such vastly different remedies based on the fortuity of who provided the medical care. Cf. *Feres,* 340 U.S. at 143.

states govern military decisions and judgments made by civilians playing a crucial role in this very same military operation.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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